No. 76-287

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

G. L. (PETE) HOWELL, ET AL., *Appellants*

*vs.*

MANUEL DeBUSK, ET AL., *Appellees*

On appeal from the United States District Court
for the Northern District of Texas, Dallas Division

## Jurisdictional Statement

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### JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Northern District of Texas, Dallas Division, entered on April 15, 1976, as supplemented by the memorandum and order of said Court, entered on April 22, 1976, denying attorney's fees to Appellants and sustaining the Federal constitutionality of Article 13.08 (Supp. 1975) of the Texas Election Code.

Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW

The opinion of the three-judge trial Court, entered on April 15, 1976, which is not yet reported, is attached hereto as Appendix A; and the order or judgment of the Court, entered on April 22, 1976, which is not yet reported, is attached hereto as Exhibit B.

## JURISDICTION

On April 1, 1976, Appellants filed an original complaint, pursuant to appropriate statutory provisions, which invoked the jurisdiction of the Court below under the First and Fourteenth Amendments to the Constitution of the United States, requesting attorney's fees, seeking to have Article 13.08 (Supp. 1975) of the Texas Election Code declared unconstitutional, and to have Appellees enjoined from the enforcement of said statute, a copy of which is attached hereto as Appendix C. The three-judge trial court entered an opinion on April 15, 1976, (Appendix A), supplemented by memorandum and order of April 22, 1976 (Appendix B), denying all relief to Appellants, who filed a Motion to Stay Judgment Pending Appeal, together with a Motion for New Trial, on April 21, 1976, both of said motions being denied by order of the Court entered on April 23, 1976, a copy of which is attached hereto as Appendix D. A Notice of Appeal was filed with the trial Court on April 29, 1976, a copy of which is attached hereto as Appendix E.

On April 30, 1976, the United States Supreme Court entered the following order in Cause No. A-940, entitled *G. L. (Pete) Howell, et al., vs. Manuel DeBusk, et al.*: "The application for an injunction, presented to the Court at 6:30 p.m., April 29, 1976, is denied."



The jurisdiction of the Supreme Court of the United States to review the judgment of the three-judge trial court is conferred by 28 U.S.C. 1253. See *Flast v. Cohen*, 392 U.S. 83 (1968); *Zemel v. Rush*, 381 U.S. 1 (1965); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963); and *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960).

## QUESTION PRESENTED

Whether Article 13.08 (Supp. 1975) of the Texas Election Code is unconstitutional in that it violates the First and Fourteenth Amendments to the Constitution of the United States.

## STATUTE INVOLVED

The Legislature of the State of Texas has heretofore enacted Article 13.08 (Supp. 1975) of the Texas Election Code, which statute (Appendix C) was challenged by Appellants in the three-judge Court below.

## STATEMENT

### 1. Five Bites At The Cherry

"It is not every case in which a litigant has had 'one bite at the cherry' that the law forbids another," said Mr. Justice Rutledge, in a dissenting opinion in *Angel v. Bullington*, 330 U.S. 183, 203 (1947).

But the State of Texas is now defending its *fifth* bite at the cherry! As it is written in the scriptures:

". . . they have sought out many inventions." *Ecclesiastes* 7:29. And Appellants respectfully suggest that in the interest of judicial economy, if for no other reason, there must be an end at some point to relegislating and relitigating the same issues over and over again.

Five sections of the Texas Election Code, which authorized the Democratic Party to charge candidate filing fees as high as $8,900 as a precondition to access to the 1970 primary election ballot, were declared unconstitutional by a three-judge United States District Court for the Northern District of Texas, Dallas Division, by orders dated April 3, 1970, and December 21, 1970. See *Carter v. Dies*, 321 Fed. Supp. 1358, affirmed *sub nom. Bullock v. Carter*, 405 U.S. 134 (1972), for a resume of said statutes and the reported court opinions invalidating same.

**Bite 1.** On June 4, 1971, the Texas Legislature passed House Bill 5, a "contingent temporary law," suspending enforcement of the *Carter* filing fees for the year 1972, and replacing them with a new schedule which attempted to authorize filing fees of up to 16% of the annual salary of the office sought, with an alternative, for those unable to pay the filing fee, of a 10% nominating petition supported by a pauper's affidavit to be sworn to by the candidate and a party loyalty affidavit to be sworn to by each signer of the petition. The same three-judge *Carter* Court, on January 20, 1972, struck down the new statute, because "there has been no modification of the Texas Election Code justifying a different result." See *Johnston v. Luna*,



338 F'ed. Supp. 355, for a copy of the statute and court order. An application for stay in the *Johnston* case was denied by Mr. Justice Powell, on January 27, 1972, in Cause No. A-769. No appeal was perfected in this case, and the judgment of the trial court became final by operation of law.

**Bite 2.** Shortly after the stay application was denied, the Secretary of State filed a motion requesting the *Johnston* Court for authority to establish a new schedule of ballot access requirements; and on February 2, 1972, the three-judge court entered an order authorizing him ". . . to take such action as may be necessary . . . for the uniform operation of primary elections consistent with *Carter v. Dies.*" A copy of said order is attached hereto as Appendix F. The next day the Secretary of State promulgated an "Order establishing rules for primary elections pursuant to the judgment of the Court and pursuant to the duties of the Secretary of State as Chief Election Officer of the State," which contained the following conclusion: "The Secretary of State concludes that the following fee schedule with a nominating petition as an alternative to the fee satisfies the State interest in regulating the ballot without placing a wealth requirement upon candidacy in Texas." See Appendix G for a copy of the February 3, 1972, schedule promulgated by the Secretary of State. The Fort Worth plaintiffs in the *Johnston* case filed an immediate motion requesting the Court to strike down the new requirements; but on February 8, 1972, the three-judge Court denied the motion and put its stamp of approval upon the *Bullock* requirements. This judgment of the Court, a copy of

which is attached hereto as Appendix H, was not appealed by any of the parties to the lawsuit, including the Attorney General, and became final by operation of law. Appellants allege that this final judgment of a Court of competent jurisdiction is conclusive of all the issues raised in the present appeal, except the question of whether the State of Texas can have two alternative routes of access to the ballot under the least drastic means principle. As Mr. Justice Douglas said, in *Brownell v. Chase National Bank*, 352 U.S. 36, 39:

> . . . the Attorney General tendered in the first suit his claim to the entire . . . (controversy). Cf. *Young v. Higbee Co.*, 324 U.S. 204, 208-209. Under familiar principles of *res judicata*, the claim so tendered may not be relitigated, *Cromwell v. County of Sac*, 94 U.S. 351, 352, *Tait v Western Maryland Railroad Co.*, 289 U.S. 620-623. If he was not content with the first ruling, his remedy was by . . . (review) to this Court. *Angel v. Bullington*, 330 U.S. 183, 189. Having failed to seek and obtain that review, he is barred from relitigating the issues tendered in the first suit.

**Bite 3.** On February 7, 1972, the very day of the filing deadline for the party primary elections, and before the three-judge Court had approved the orignal schedule of February 3, 1972, the Secretary of State attempted to modify his original nominating petition requirements by adding provisions which called for the address and voter registration number of each signer and for the signature of each signer to be notarized (*Fort Worth Press*, February 25, 1972). It is reasonable to infer that the Secretary of State submitted this



amended schedule to the three-judge Court before it approved the original schedule by its order of February 8, 1972 (Appendix H), and that the Court's approval of the original schedule was a disapproval of the amended schedule.

**Bite 4.** Not content with the original schedule promulgated by the Secretary of State on February 3, 1972, and approved by the three-judge *Carter* and *Johnston* Court on February 8, 1972, or even the amended schedule of the Secretary of State promulgated on February 7, 1972, the Texas Legislature, in 1973, escalated the filing fee and nominating petition requirements by enacting Senate Bill No. 11, Article 13.08c-2, which is attached hereto as Appendix I. It is no wonder that Paul Wehrle, Election Division Director in Secretary of State Bob Bullock's administration, was quoted in the Fort Worth *News-Tribune*, on November 15, 1974, as follows:

> Historically, Texas election laws have been barriers to public access to the political system rather than a set of orderly procedures designed to facilitate the election process. With two or three exceptions, every landmark election law case argued before the United States Supreme Court has been generated by an inequity embodied in Texas law.

**Bite 5.** Again in 1975, the Texas Legislature, not satisfied with even its own set of 1973 requirements, escalated the filing fee and nominating petition requirements once more, by enacting the new Article 13.08 (Supp. 1975) of the Texas Election Code (Appendix C), which is the subject of the present litigation, *and*

*raising some filing fees to 10 times the size of the filing fees approved by the three-judge court in 1972!*

Not since the white-primary litigation has the United States Supreme Court been so vexed with the same recurring litigation from the State of Texas. See *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Smith v. Allwright*, 321 U.S. 649 (1944); and *Terry v. Adams*, 345 U.S. 461 (1953).

The Supreme Court is now being called upon to review the third set of Texas filing fee and/or nominating petition requirements in five years. Which brings to mind the question propounded in the Motion to Dismiss or Affirm, filed in the case of *Bullock v. Carter*, supra, 315 U.S. 134, at page 18: "Have the Appellees won only the right to relitigate the reasonableness of a new set of filing fees every time the Texas Legislature convenes?"

### 2. The 1972 Massacre

As explained above, on February 7, 1972, the day of the filing deadline, the Secretary of State amended his own February 3 schedule (Appendix G) by adding to the nominating petition requirements. Although the three-judge court approved the February 3 schedule on February 8, 1972 (Appendix H), the Democratic Party officials of Tarrant County continued to insist upon candidate compliance with the more burdesome February 7 requirements, which were never approved by the court.



On February 15, 1972, the *Fort Worth Press* carried a story pointing out that twelve women would be on the Tarrant County ballot, including Mrs. Lou Hancock, the only opponent Gib Lewis, State Representative, Place 4, had in the Democratic primary election:

> **Mrs. Hancock is a political greenhorn, but already she is fed up with the Democratic machinery.**
>
> **"Maybe I shouldn't say anything about this, but it has been bothering me," said Mrs. Hancock, who is in the Place 4 race along with Lewis and Raza Unida candidate Michael K. Saurez.**
>
> **"I knew nothing about the Democratic Party in Tarrant County until I tried to find out how to go about filing for office. It seems that the Democratic headquarters is closed. Then I found out that J. D. Tomme was our Democratic chairman.**
>
> **"I called Dr. Tomme's dentistry office and a girl told me they were taking care of whatever political business they could. So I went over there. Utter chaos. Everything was in a mess, so I decided to come back on Monday.**
>
> **"WHEN I went back on Monday," said Mrs. Hancock, "they finally let me back in the inner sanctum — a little room about the size of a linen closet where two women were taking applications, answering the phone and trying to conduct the Democratic Party from this little cubby-hole.**
>
> **"If you'll excuse the expression, trying to get anything done over there is like pulling teeth."**
>
> **Mrs. Hancock's problem was compounded by the fact that she did not intend to pay a filing fee and requested information about a copy of the petition she would need for signatures.**
>
> **"They were confused and busy. It wasn't the fault of the girls . . . they just didn't know anything.**
>
> **"Before going in there I felt paying a filing fee would violate my constitutional rights, but now another reason I refuse to pay a filing fee is that I don't want to oil the cogs of the apparently morally and physically defunct local party machinery.**
>
> **"I'm not accusing party machinery of chicanery or anything, but I do believe it should be set up where it could continue to function in case of an emergency.**
>
> **"There should be a volunteer staff or an assistant chairman or somebody to take over—either that, or they are trying to keep me off the ballot. I don't know, but it sure makes me mad."**
>
> **At last word, Mrs. Hancock still didn't have the information about a petition, although the secretary of state in Austin said such a form had been sent to the Democratic office here.**

Another woman was having trouble with nominating petitions in Tarrant County, according to the *Fort Worth Star-Telegram*, which carried the following story under date of February 25, 1972:

Candidates who are circulating nominating petitions in lieu of paying filing fees have found that it would be easier and, in some cases, less expensive if they didn't try to buck the system.

Secretary of State Bob Bullock has imposed a mandatory filing fee schedule for candidates running in party primaries.

Bullock also set up a nominating petition system whereby a candidate for local office can submit a list of names containing no more than 300 names instead of paying a filing fee.

Mrs. Betty Andujar, a candidate for State Senate District 12, began collecting the names for her petition shortly after Bullock's announcement.

* * *

**UNDER BULLOCK'S** filing fee schedule, Mrs. Andujar would not have to pay $150 if she came up with the 300 signatures.

Mrs. Andujar had gotten most of her signatures when she and other candidates received information from Bullock elaborating on his signature plan.

One of the provisions calls for getting the addresses of everyone who signs a petition. No problem. That's standard.

In addition to the addresses, each signature must be notarized, and each person signing must include his voter registration number. Problems.

If you paid a notary 50 cents to notorize the 300 names on the petition, you would end up paying $150. This, of course, does not include the time and gas used running to a notary every time a person signs a petition.

* * *

**FOR PERSONS** who are running for state representative, the notary bill would be $50 more than the filing fee. The money used to pay a notary would be at least $100 more than the filing fee required for county commissioner, justice of the peace and constable candidates.

The signatures required for persons running for statewide offices is 2,500. To pay a notary 50 cents per signature woud cost $1,250, or $850 more than the mandatory filing fee.

The next problem.

How many people carry their voter registration cards with them?

It's easy to get a person to sign a petition, but quite difficult to find a person who will sign, and who just happens to know his voter registration number.

* * *

**MRS. ANDUJAR,** stating that she could not depend on the state officials making election rules, accused Bullock of "evading the intent of the law."

"The intent (of a three-judge federal court) was to make it possible to get people on the ballot without paying fees," Mrs. Andujar said.

Deadline for paying filing fee is Monday, and the deadline for submitting a valid nominating petition is March 4.

Mrs. Andujar, confused and despondent, has yielded to the system.

She gave up on tracking down all the persons who signed her petition, and mailed a check for $150 to pay her filing fee.



On March 20, 1972, the Tarrant County Democratic Executive Committee unanimously passed a resolution denying all candidates who failed or refused to comply with the Bullock requirements access to the May 6 primary election ballot. Nine days later, Theodore Wischkaemper filed suit in the Fort Worth Court of Civil Appeals challenging the constitutionality of said requirements, but this court refused to take jurisdiction of the case. Then on April 15, 1972, Wischkaemper challenged the constitutionality of said requirements in the Texas Supreme Court, alleging among other things as follows:

13. The Bullock requirements are unconstitutional, under *Carter v. Dies*, because the filing fee is still being used as a revenue collecting device.

* * *

14. The Bullock requirements are unconstitutional, under *Carter v. Dies*, because the filing fee, in effect, has been made an absolute requirement for access to the ballot, since the so-called alternative of a nominating petition is meaningless, as the requirement of notarized signatures on the nominating petition makes the petition more costly than the filing fee if the candidate pays the statutory fee of 50c, Art. 3945, V.A.T.S., for each signature. * * * * Not a single candidate in Tarrant County was able to get the required number of notarized signatures in the time allotted under

the Bullock rules, which means that only those candidates who paid the filing fee have been allowed on the ballot in Tarrant County.

* * *

23. * * * In addition to Relator Wischkaemper, four other local candidates who failed or refused to comply with the Bullock requirements were struck from the Tarrant County ballot by the local Respondents; and . . . three local incumbent office holders would be entirely without opposition in either the Democratic or Republican Primaries if the so-called "mandatory" Bullock requirements were allowed to prevail.

* * *

But the Texas Supreme Court joined the Fort Worth Court of Civil Appeals and the three-judge Federal Court in refusing to declare the Bullock requirements unconstitutional; and Theodore Wischkaemper, the man who ran for County Judge in 1970 without paying a "patently exclusionary" $6,300 filing fee, was denied a place on the 1972 ballot as a candidate for State Representative, Place 6, not only because he was unable to pay a $100 filing fee but also because he was unable to pay the $150 notary bill on a nominating petition that was supposed to be a "reasonable alternative" for the filing fee.

And Joe Spurlock II, the incumbent State Representative, Place 6, Tarrant County, was reelected in 1972 because he was the only candidate for that office on the Democratic primary election ballot.



### 3. The 1974 End Run

The 1974-1975 edition of *Texas Election Laws*, compiled by an attorney and published by Hart Graphics of Austin, Texas, according to the preface "includes the Election Code and all amendments thereto by the Regular Session of the 63rd Legislature, 1973." This particular edition of the unofficial handbook for political party officials was designed for use during the 1974 party primary elections.

A careful examination of this authoritative volume reveals that the State Legislature, perhaps "inadvertently," as late as 1973 had still not removed from the Texas Election Code certain provisions pertaining to filing fees and nominating petitions which had been invalidated by Federal Court orders in 1970 and 1972.

Art. 13.07a (1967) and Art. 13.08 (1967), which were both declared unconstitutional by a three-judge United States District Court on December 21, 1970, in the case of *Carter v. Dies*, 321 Fed. Supp. 1358, affirmed *sub nom. Bullock v. Carter*, 405 U.S. 134 (1972), were included in this handbook for use in the 1974 elections.

Articles 13.07a(3), 13.08(1), 13.08(5), 13.08(6), 13.08(7), 13.08c(a), 13.08c(b), 13.08c(c), 13.08c(d), 13.08c(e), 13.08c(f), 13.08c(g), 13.08c(h), and 13.08c(i), all passed on June 4, 1971, as House Bill 5, by the Texas Legislature were declared unconstitutional by the three-judge *Carter* court, on January 20, 1972, in the case of *Johnston v. Luna*, 338 Fed. Supp. 355, because "there has been no modification of the

Texas Election Code justifying a different result." But, nevertheless, this invalid statute (which attempted to authorize filing fees of up to 16% of the annual salary of the office sought, with an alternative, for those unable to pay the filing fee, of a 10% nominating petition supported by a pauper's affidavit to be sworn to by the candidate and a party loyalty affidavit to be sworn to by each signer of the petition) was also included in this handbook for use in the 1974 elections.

Although it is true that Art. 13.08c-2, also included in the handbook, following House Bill 5, contains "modifications and clarifications" provided by Senate Bill 11 (Appendix I), this section, entitled "conduct of primary elections," a caption which is not exactly self-explanatory, is rather obscurely placed for a county chairman not exactly anxious to find it.

A careless or covetous county chairman, after reading Art. 13.18(4) of this handbook, which authorized a 5% commission to him of all the filing fees he could spend, in construing an ambiguous Election Code might have preferred House Bill 5 to Senate Bill 11. In other words, he might have been tempted to choose $50 deposits and 16% filing fees over zero deposits and $50-$400 filing fees.

And for those troublesome free-loaders unable or unwilling to contribute to his slush-fund, the temptation would have been very great for the county chairman to choose a 10% nominating petition with a pauper's affidavit for the candidate and a party loyalty affidavit for each of the signers, over a 2% nominating petition



without any affidavit for either the candidate or the signers of the petition.

It is within the realm of possibility that an unscrupulous county chairman, under such circumstances, might have used the more burdensome requirements for political foes and the less burdensome requirements for political friends.

And it is reasonable to infer that the legislature had some reason to leave these outlawed provisions in the Texas Election Code for so long a period of time. It is also reasonable to infer that some county chairmen might have taken advantage of the situation to feather their own nests.

### 4. The 1976 Massacre

Political shock waves rocked Dallas County, Texas, when Carolyn Barta reported in the *Dallas Morning News*, on March 10, 1976, that eight candidates had been dropped from the Democratic primary election ballot:

> Eight Dallas County Democratic candidates will be stricken from the primary ballot as a result of faulty petitions, unless their names are ordered restored by the Texas Supreme Court.
>
> The candidates include seven running for State Legislature: Pete Howell, District 33-G; Janet L. Shafer, 33-N, Dr. Emerson Emory, 33-C; Ken Freeman, 33-J; Ken Gjemre and Mary Riffe, 33-K; Martha Dickey Macon, 33-R; and constable candidate Maxie L. Lee, precinct 3.
>
> Each of the candidates submitted petitions with the required number of signatures in lieu of filing fees, an acceptable way of qualifying for the ballot according to the Texas Election Code.
>
> But the petitions, prepared by the county Democratic headquarters, failed to include a sworn statement by the petition collector, as required by law, attesting to the validity of the signatures.
>
> The ballot purge Tuesday resulted from a suit brought against Pete Howell by his opponent Richard Scott Geiger, who seeks his father's legislative seat in District 33-G.

Geiger charged Howell with failing to submit the sworn statement and the 5th District Court of Civil Appeals agreed with Geiger, ordering Dallas County Democratic Chairman Manuel DeBusk to remove Howell's name.

DeBusk said Tuesday seven other candidates are "in the same position" as Howell, and he notified them that their names also would be removed.

According to DeBusk, the local Democratic headquarters received a "verbal approval" of the petition form by telephone from the Secretary of State's office in October. The form was prepared by headquarters executive Betty McDonald. At that time, the secretary of state's office had no form available, DeBusk said.

Secretary of State Mark White, however, said Tuesday, "We checked our files thoroughly for September, October and November, 1975, and couldn't find any communication with the people at the (Dallas County) executive committee concerning this matter.

"Any suggestion that we approved a defective form is wrong," White added. "They say they've sent something to us, but I don't have anything in the files to indicate we ever received anything. And certainly we're not going to approve over the telephone something we haven't seen."

Howell's attorney, Joe Devany, said he will appeal to the Texas Supreme Court Wednesday and feels a decision will be made before Monday, when candidates draw for ballot position.

DeBusk is hopeful the Supreme Court will reverse the decision because his office "acted in good faith" and the candidates "acted in good faith." He added that the headquarters checked every signature and he feels the "spirit of the law has been met."

If the Supreme Court fails to overturn the decision, the removal of the names will mean three incumbent legislators will be unopposed for re-election: Democrats Paul Ragsdale, 33-N, and Carlyle Smith, 33-J, and Republican Fred Agnich, 33-R.

The next morning the same newspaper carried a follow-up story indicating that the Texas Supreme Court, without comment, had refused to consider a request that the names of the eight candidates be restored to the May 1 Democratic ballot.

On March 12, 1976, Ron Calhoun, political writer for the *Dallas Herald*, explained how seven of the eight candidates managed to have their names restored to the ballot:



Seven Dallas County Democratic candidates who were in danger of being dropped from the May 1 primary ballot because of a court decision have taken action to regain their status as primary candidates.

County Democratic chairman Manuel DeBusk said Thursday he agreed to permit the seven to correct improperly filed candidate petition forms and refile them at county party headquarters.

DeBusk acted under what he described as his "administrative" powers.

The case has been fouled up since Tuesday when the Dallas Court of Civil Appeals ruled Oak Cliff insuranceman Pete Howell could not appear on the ballot because his candidate petition did not carry affidavits required by law attesting to the validity of the signatures.

But Howell's case is different from the other seven even though all eight filed by the same method and made the same mistake, DeBusk said.

Howell was the subject of a suit specifically blocking him from filing for office. The suit was filed by one of his opponents in State House Dist. 33-G (central Oak Cliff), Richard Scott Geiger, son of State Rep. Dick Geiger who is not seeking another term.

After the Dallas court ordered DeBusk to deny Howell a ballot position and after Howell failed to gain relief from the State Supreme Court, DeBusk decided he could not accept the filing of the other seven candidates.

But legislative candidate Ken Gjmere, one of the seven, said after contacting the secretary of state's office, it was determined the county chairman had "broad discretionary powers" under the state election code to correct "clerical and technical errors."

"Manny (DeBusk) couldn't take us off the ballot," Gjmere said. "He had a court order to take Howell off but he had no mandate to do that to us."

Gjmere expressed anger over the whole affair, criticizing both DeBusk and Secretary of State Mark White's office for failing to properly interpret the election code in the case.

The other six candidates who regained primary ballot status were Dist. 3 constable candidate Maxie Lee, and candidates Emerson Emory, Ken Freeman, Mary Riffe, Janet Shafer and Martha Macon.

The improper petition forms were drawn up in the county Democratic headquarters, which is under DeBusk's supervision. DeBusk claimed the secretary of state's office approved the petition forms but White said he could find no one in his office who gave such approval.

DeBusk said he would recommend the County Democratic Executive Committee certify the seven Monday night when it meets to approve the Dallas County primary ballot.

The only thing that could prevent that, he said, would be for opponents of the seven or some other interested party to file suits against them similar to Geiger's suit.

DeBusk was embroiled in another candidate filing case which was settled in a separate court action Thursday. Dist. Judge Joe Bailey Hum-

phreys ordered DeBusk to accept the filing fee of George Brewer, Dist. 8 constable.

DeBusk had refused to accept Brewer's filing fee, claiming Brewer did not meet statutory residency requirements.

Following Humphreys' order, DeBusk said he decided to accept the filing fee of black conservative Clay Smothers who had wanted to run in Dist. 33-G. DeBusk had contended Smothers also failed to meet residency requirements.

* * *

But on March 30, 1976, the *Dallas Morning News* reported that three of the candidates who were restored to the ballot on March 11th were again off the ballot:

Mary Riffe, a candidate in the Dist. 33-K Democratic primary, dropped out of the race Monday because she fears her faulty filing petition would make her subject to disqualification even if she won the primary.

"My lawyers and the Court of Civil Appeals judges have assured me that I could be disqualified by any registered voter, or an opponent, Democrat or Republican, at any time," said Mrs. Riffe.

Mrs. Riffe is one of eight Democrats whose place on the ballot has been questioned because the petition forms supplied by Dallas County Democratic headquarters contained a clerical error.

"To continue to run in this election and win in the primary would allow the Republicans their only chance to steal a longtime solid Democratic district," she said.

**DIST. 33-K COVERS EAST** Dallas, part of South Dallas and near North Dallas. The incumbent, Jim Mattox, is running as a Democrat in the 5th Congressional District primary.

Another candidate in 33-K, Ken Gjemre, who also filed for election by petition in lieu of the $300 filing fee, is likewise subject to court challenge if he remains on the ballot.

Three Democratic candidates have already been removed by court action initiated by opponents. They are Emerson Emory, Dist. 33-C, Janet Shafer, Dist. 33-N, and Pete Howell, Dist. 33-G.

Gjemre said Monday, "I never would let someone else's clerical error keep me from being the representative in 33-K. If anybody ever challenged me, it would be in federal court in 20 minutes."

**MISS SHAFER**, meanwhile, filed suit Monday in federal court in an effort to get back on the ballot. Miss Shafer, who was the only opponent to Rep. Paul Ragsdale, claims the rights of the voters (under the 14th Amendment) to make a choice have been abridged. She was not told whether the court will hear her case.

Dallas County Democratic Chairman Manuel DeBusk said late Monday he has not been notified of Mrs. Riffe's withdrawal and did not feel her position on the ballot would have been jeopardized if she won.

But DeBusk said he has not researched the legal question of whether those candidates still on the ballot despite faulty petitions could be challenged after winning the primary and doesn't plan to look into the point.

"If they lose, they lose. If they win, they will be certified as the Democratic candidates," he said.

**DeBUSK ALSO** defended the local Democratic headquarters, noting that legislative candidates Emory and Shafer prepared their own petitions. The local headquarters did distribute the faulty petitions used by Howell and Mrs. Riffe.

Other candidates who used faulty petitions and originally were taken off the ballot by DeBusk but later restored and remain on the ballot now in the absence of legal action against them include Ken Freeman in Legislative Dist. 33-J and Gjemre, and constable candidate Maxie L. Lee.



Thus, of the eight candidates originally stricken from the 1976 Dallas County Democratic primary ballot for faulty nominating petitions, three were removed by court order and one gave up in fear of being removed by Court order, leaving only four of the original eight who survived the onslaught, but who were still in jeopardy of being disqualified by a lawsuit at any time, even in the event of election to office.

Meanwhile, 30 miles to the west, a candidate for State Representative, District 32-B, Tarrant County, was also having problems in qualifying for a place on the 1976 Democratic primary election ballot. (See Affidavit of Bill Eden attached to Motion for New Trial). About 10 days before the filing deadline, this candidate discovered that the Fort Worth party headquarters did not have any nominating petition forms. "We don't encourage people to file with petitions," he was told, "because we have had so many problems with them in the past." Then, after Eden, a pre-law student, obtained 185 signatures (35 more than necessary) to a petition form which he had obtained from a Dallas friend, the Fort Worth headquarters refused to accept the petition because he needed "at least 100 extra signatures."

Mr. Eden reluctantly paid his $300 filing fee and took his petition home with him, because he was not even allowed to file it under protest. "For all practical purposes," Eden says in his affidavit, "there is no reasonable alternative to a filing fee the way the law is administered in Tarrant County. You either pay the filing fee or you just don't get on the ballot."

## THE QUESTIONS ARE SUBSTANTIAL

While the ultimate question for determination by this Court is whether Art. 13.08 (Supp. 1975) of the Texas Election Code violates the Constitution of the United States, the Court is presented with several issues in arriving at its conclusion.

### 1. Collateral Estoppel

On February 3, 1972, "pursuant to the judgment of the Court," the Secretary of State of Texas promulgated a schedule of ballot access requirements (Appendix G), approved by the three-judge *Carter* and *Johnston* on February 8, 1972 (Appendix H), in which the Chief Election Officer of the State made this determination:

> The Secretary of State concludes that the following . . . schedule . . . satisfies the state interest in regulating the ballot without placing a wealth requirement upon candidacy in Texas.

Under the familiar principles of *res judicata*, collateral estoppel by judgment, and equitable estoppel, appellees herein are now estopped from collateral relitigation of the very issues resolved by the judgment of a



court of competent jurisdiction which was never appealed and which has now become final by operation of law. Not only did the three-judge Federal Court approve this 1972 Schedule, but the Fort Worth Court of Civil Appeals and the Texas Supreme Court also approved it; and it was cited as authoritative by another three-judge Federal Court, on May 4, 1972, in the case of *Stoner v. Fortson*, 359 Fed. Supp. 579, 585.

In the case at bar there was neither allegation nor scintilla of proof that conditions had so materially changed since February 3, 1972, that an escalation of ballot access requirements was either desirable or necessary, for any purpose whatsoever.

Therefore, the 1972 Schedule still "satisfies the state interest in regulating the ballot," so that the 1975 filing fees and the 1975 nominating petition requirements are both unreasonable and unnecessary as a matter of law. Which means that there is only an unreasonable 1975 alternative means of ballot access for an indigent candidate unable to pay the unreasonable 1975 filing fees. It has been stipulated that Janet L. Shafer, a pre-law student, is too poor to pay the statutory filing fee.

And, as Mr. Chief Burger said in *Lubin v. Panish*, 415 U.S. at 718 (1974): ". . .in the absence of reasonable alternative means of ballot access, a state may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay."

### 2. The First Amendment

"Just the other day, in *Hynes v. Mayor of Oradell*, 48 L. Ed. 2d. 243 (1976)," said Mr. Justice Blackmun in *Young v. American Mini Theatres*, 49 L. Ed. 2d 310 (1976), "we reaffirmed the principle that in the First Amendment area 'government may regulate . . . only with narrow specificity,' NAACP v Button, 371 US 415 . . . (1963), 'avoiding the use of language that is so vague that men of common intelligence must necessarily guess at its meaning.' *Connally v. General Construction Co.* 269 US 385, 391 . . . (1926)."

One who signs the statutory nominating petition must promise not "to participate in the primary elections . . . or other party affairs of any other party . . . during the voting year," under the penalty of criminal sanctions. This is prior restraint in its worst form, and there is a vagueness and overbreadth to the statute which amounts to constitutional infirmity.

The 128 voters who signed the petition for Pete Howell not only have been denied their constitutional right to vote for the candidate of their choice, but they may now be guilty of a misdemeanor if they "participate" in an appreciation dinner for U. S. Senator John Tower because he is a Republican, or if they "participate" in a re-election rally for the President of the United States! And, *Buckley v. Valeo*, 424 U.S. 1 (1976), to the contrary notwithstanding, they cannot even check-off $1.00 for presidential primaries on their 1976 income tax returns, because the money will not go exclusively to the Democratic nominees.



Article 13.08 (1975 Supp.) is an identification statute, requiring the door-to-door campaigner to identify himself to the political opposition, which has the purpose or effect of discouraging free speech. And is prior restraint as to future elections.

*Talley v. California*, 362 U.S. 60, 64 (1960), invalidated a Los Angeles ordinance requiring handbills to carry the name and address of persons distributing them. Since the requirement destroyed anonymity, "(t)here (could) be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."

The recent decision of *Buckley v. Valeo*, 424 U.S. 1 (1976) recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Moreover, door-to-door solicitation, unlike the contribution of money, is an activity of high visibility. Consequently, the danger of deterrence is much greater here than with respect to contributions.

### 3. The Fourteenth Amendment

The challenged statute, which requires the circulator of a petition to read a "statement" to each voter before he can sign the instrument creates an irrebuttable presumption of illiteracy as to certain voters but not as to others, a classification which is discriminatory on its face.

Further, a person who signs one nominating petition and circulates another, need not swear to the circula-

tor's affidavit on the second petition, because the statute says: "It is the specific intent of the legislature that there shall be no requirement for the administering of an oath to any person signing a petition under the provisions of this section." See Article 13.08(d) (1975 Supp.). This exception creates a statutory classification that defies rational explanation and relieves all circulators (including those for Pete Howell) of swearing to the affidavit. And it may explain the absence of a jurat on the faulty nominating petitions which brought about this lawsuit.

Also, the statute denies a candidate, such as Bill Eden, due process of law when it compels him to submit the question of "sufficiency of the petition," Article 13.08(d) (1975 Supp.), to the county chairman of the political party who has a direct pecuniary interest, Article 13.08(i) (1975 Supp.), in any decision as to whether the petition is adequate to excuse the candidate from payment of the filing fee, See *Tumey v. Ohio*, 273 U.S. 510, 535 (1927), and who is subject to temptation to forget the burden of proof required because his responsibilities as county chairman "may make him partisan to maintain the high level of contributions" from filing fees; moreover, the fact that the initial determination can be appealed to a State Court does not cure the defect, because he is entitled to an impartial judge in the first instance. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

Eight candidates with faulty nominating petitions attempted to qualify in Dallas County, Texas, for a place on the 1976 Democratic primary election ballot.



Three of them were removed from the ballot by order of the Dallas Court of Civil Appeals, one withdrew of her own volition, and four were allowed to remain on the ballot by appellees, who now take the position that the action of the State Court was not the action of the State, so that the Fourteenth Amendment rights of the three candidates were not violated. But appellants insist that the action of a State Court is the action of the State. And, as Mr. Justice Powell recently said, in *Communist Party of Indiana v. Whitcomb*, 414 U. S. 441, 452 (1974): "It follows that the appellees' discriminatory application of the . . . statute denied appellants equal protection."

### 4. The Least Drastic Means

Mr. Chief Justice Burger, in *Buckley v. Valeo*, 46 L. Ed 2d. 659, 812 (1976), quotes with approval from the concurring opinion of Mr. Justice Brennan, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), as follows: "In the case of First Amendment freedoms, government has the duty to confine itself to *the least* intrusive regulations which are adequate for the purpose." (Emphasis added.) Also he quotes from Mr. Justice Stewart, to the same effect, in *Shelton v. Tucker*, 364 U.S. 479, 488 (1960): "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

There is no articulated State explanation or justification for the statutory "statement" or "affidavit" required by the challenged statute, but whatever the pur-

pose of these two parts of the nominating petition, that purpose may be served by "less drastic" means, such as verification of signatures (as was done in this case by the county chairman) or by amendments to the criminal statutes.

Appellants join with appellees in asserting that there is a need for regulating the ballot in Texas, but firmly believe that the least intrusive method of such regulation is the nominating petition, pruned of the "statement" and "affidavit" herein complained of.

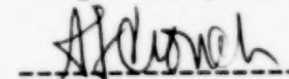
## CONCLUSION

Segregated access to the ballot drawn along economic lines can not more withstand constitutional scrutiny than segregated access to public facilities drawn along racial lines. In *Brown v. Board of Education*, 347 U. S. 483, 492 (1954), the Supreme Court repudiated the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U. S. 536 (1896), as applied to the public school room. And appellants now ask the Supreme Court to repudiate the "separate but equal" doctrine of *Bullock v. Carter*, 405 U.S. 134 (1972), as applied to access to the primary election ballot, and to require the State and the Democratic Party to discontinue the exaction of filing fees from political candidates in all future elections in Texas as a precondition to access to the ballot, in favor of a uniform nominating petition procedure, under the least restrictive means principle.



It is submitted that the questions presented by this appeal are substantial and of such public importance that plenary consideration by this Court is warranted.

Respectfully submitted,



A. L. Crouch
*Attorney for Appellants*
109 North Taylor Street
Fort Worth, Texas 76102
1-817-336-0335

## CERTIFICATE OF SERVICE

I, A. L. Crouch, attorney for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25 day of August, 1976, I served a copy of the foregoing Jurisdictional Statement on Appellees by depositing a copy in the United States mail, postage prepaid, and addressed to the attorneys of record for said Appellees as follows: Ms. Elizabeth Levatino, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, attorney for appellees Briscoe, White and Hill; and Mr. Earl Luna, 1002 Dresser Building, 1505 Elm Street, Dallas, Texas, 75201, attorney for appellees DeBusk, Guest and McDonald.

I further certify that I have mailed a copy of same to Mr. Ronald W. Kessler, successor Chairman of Dallas County Democratic Executive Committee, Metropolitan Federal Savings Bldg., 1407 Main Street, Dallas, Texas, 75202, *pro se*, ex-officio successor Appellee, and to Ms. Janet L. Shafer, 1536 Bilco Street, Dallas, Texas, 75232, *pro se*.

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109 North Taylor Street
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## APPENDIX A

[FILED APR. 15, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-76-0481-G
(CONSOLIDATED WITH CIVIL
ACTION NO. CA3-76-0455-G)

G. L. (PETE) HOWELL, ET AL.

v.

MANUEL DeBUSK, ET AL.

JANET L. SHAFER

v.

MANUEL DeBUSK, CHAIRMAN, DALLAS
COUNTY DEMOCRATIC EXECUTIVE
COMMITTEE AND DALLAS COUNTY
EXECUTIVE COMMITTEE

### JUDGMENT

The above consolidated cases coming on duly to be heard, and all parties appearing and announcing ready, and the court having heard the evidence and argument of counsel for all parties, and being of opinion as follows, it is

ORDERED, ADJUDGED AND DECREED that:

1. The motions to dismiss are denied.

2. The court has jurisdiction of the parties and subject matter hereof.
3. The classes which plaintiffs seek to represent are proper and are certified.
4. Except as granted above, all relief sought by plaintiffs in all capacities is denied.
5. Plaintiffs not having prevailed, none is entitled to recover attorney's fees and such are denied.
6. Defendants shall recover their costs.
7. An opinion, incorporating findings of fact and conclusions of law, will follow.

SIGNED AND ENTERED this 15th day of April, 1976.

/s/ THOMAS G. GEE
Thomas G. Gee
United States Circuit Judge

/s/ ROBERT M. HILL
Robert M. Hill
United States District Judge

/s/ PATRICK E. HIGGINBOTHAM
Patrick E. Higginbotham
United States District Judge



## APPENDIX B

[FILED APR. 22, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No.
3-76-0455-F

G. L. (PETE) HOWELL, CLEVER DEAN LEWIS, MARIA PATLAN, PHILA MANSUR and HELEN BABB, Plaintiffs,

V.

MANUEL DeBUSK, BETTY McDONALD, CALVIN R. GUEST, MARK WHITE, JOHN HILL and DOLPH BRISCOE, Defendants.

Civil Action No.
3-76-0481-G

JANET L. SHEAFER, Plaintiff,

V.

MANUEL DeBUSK, CHAIRMAN, DALLAS COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, and DALLAS COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, Defendants.

### MEMORANDUM AND ORDER

Before GEE, Circuit Judge, Hill and Higginbotham, District Judges.

GEE, Circuit Judge:

Plaintiff Howell, who wishes to be a candidate in the

Democratic Party primary in Dallas County, Texas, and the remaining plaintiffs, qualified voters who wish to vote for him, bring a class action for declaratory and injunctive relief against Texas election officials challenging the constitutionality of Texas Election Code Ann. art 13.08 (Supp. 1975), which requires candidates for state, district, and local offices in party primary elections who do not pay a filing fee to submit a nominating petition in lieu thereof. Plaintiff Shafer, whose separate suit has been consolidated with Howell's for trial, is similarly circumstanced as he.

Article 13.08(d) requires the following statement at the top of each page of the petition:

> I know the contents of this petition, I am a qualified voter eligible to vote in the forthcoming primary election of the (fill in name) party for the office for which (fill in name) is a candidate. I have not signed the petition of a candidate who is running for any office in the primary of any other party. I understand that by signing this petition I become ineligible to affiliate with any other party or to participate in the primary elections, conventions, or other party affairs of any other party, including a party which is not holding a primary election, during the voting year in which this election is held, and that I am guilty of a misdemeanor if I attempt to do so.

It also requires an affidavit of the person who circulated the petition stating that

> [h]e called each signer's attention to the statement and read it to him before the signer affixed his signature to the petition, and further stating that



> he witnessed the affixing of each signature, that the correct date of signing is shown on the petition, and that to the best of his knowledge and belief each signature is the genuine signature of the person whose name is signed.

The Dallas County Democratic Executive Committee, of which defendant DeBusk is chairman, prepared nominating petition forms, approved by the Secretary of State, which complied with article 13.08(d) as to heading but omitted jurat language required to make the circulator's certificate an "affidavit." After the Howell and Shafer petitions were filed and the filing deadline had passed, this omission was discovered. The necessary jurat language was added to all petitions, and all petition circulators acknowledged their signatures before a notary public. Defendant DeBusk, however, was prevented from including the two candidates' names on the official ballot by mandatory orders of an appropriate Texas court, entered in suits brought by primary opponents of Howell and Shafer. The state court found the circulator's affidavit requirement of article 13.08 to be mandatory, thus demanding strict compliance Plaintiffs' after-the-fact corrections of the certificates were therefore held ineffective and their candidacies invalid for want of proper nominating petitions. This suit followed.

Howell and his supporters make the following claims:

(1) They properly represent the class;

(2) This case should be heard by a three-judge court;

(3) 1976 filing fees, which are ten times as high as the 1972 fees, are unreasonably high;

(4) The "statement" and "affidavit" for state and local offices in party primaries required by article 13.08(d)

(a) violate equal protection because they are not required for five other kinds of state and local elections,

(b) violate equal protection because they were not required for the 1972 or 1974 elections,

(c) have not received Voting Rights Act clearance, along with several other election laws,

(d) impose an impermissible burden on the first amendment right to vote,

(e) confuse black voters and are disguised literacy test, and

(f) are not in Spanish as required by the Voting Rights Act and further are so complicated that they confuse Spanish-speaking people and thus chill their first amendment rights;

(5) Howell's removal from the ballot by state court order while other candidates were not sued by their opponents and so remained on the ballot violates Howell's equal protection rights; and

(6) Plaintiffs, if they prevail, are entitled to attorneys' fees.

Plaintiff Shafer asserts that article 13.08(d) is so vague as to violate the Equal Protection Clause. The



real burden of plaintiffs' arguments, however, and the major thrust of their evidentiary presentation appears to be that the nominating-petition procedures of article 13.08(d) are so confusing and onerous as to be unreasonably burdensome on the franchise and on would-be candidates.

**Facts**

At trial, the evidence and stipulations presented established the relevant facts to be as follows: Plaintiff Howell was able to pay the $300 filing fee for the office of legislator which he and Shafer sought, but plaintiff Shafer was not. As to her, the nominating petition procedure of article 13.08(d) was the sole means of getting on the ballot. The plaintiffs' petitions were defective only in the form of the jurat and except for this defect would have sufficed to secure them a position on the ballot. Indeed, defendant DeBusk would have placed them on the ballot but for the orders of the state court forbidding it, and he did place on the ballot several other candidates whose petitions were similarly defective but who were not the subject of state court orders. None of the circulators of petitions experienced any significant difficulty in obtaining signatures because of any requirement in the statutory procedure. The number of signatures required for nomination to these offices is not burdensome.

It is, of course, most unfortunate that plaintiffs' candidacies have been aborted and their supporters' hopes and efforts frustrated by a technical defect, the more so since the county organization may have unintentionally contributed to the error in some measure.

Nevertheless, Texas courts construing Texas law have held squarely as to both of these candidates that the defect is fatal, a construction binding upon this court. We turn to plaintiffs' contentions before us.

### Plaintiff Howell's Contentions

First, plaintiff insists that he and his co-plaintiffs properly represent the class of all present and prospective candidates and voters in Democratic primary elections. We agree.

Second, plaintiff requests that this case should be heard by a three-judge court. Since plaintiff seeks to enjoin enforcement of a state statute of statewide application, we agree that he has met the requirements of 28 U.S.C. § 2281 (1970).

Third, plaintiff's claim that the 1976 filing fees, which greatly exceed the fees charged in 1972 in order to help finance the primaries, violate his equal protection rights must fail under Bullock v. Carter, 405 U.S. 134 (1972). While the *Bullock* Court held only that a burden on the exercise of the fundamental right to vote constitutes an invidious discrimination that can be upheld only by a compelling state interest, the Court explicitly recognized that a burden felt only by candidates does not impinge on a fundamental right and can be justified by a legitimate state interest. *Id.* at 142-43. Furthermore, the Court conceded that financing the cost of primary elections is a legitimate state objective. *Id.* at 147. Since Texas has provided a reasonable alternative means of access for candidates unable to pay the



filing fee, the only burden imposed by filing fees is that placed on candidates, and plaintiff's challenge must therefore fail.

Fourth, plaintiff's challenge to the statutory "statement" and "affidavit" for state and local offices in party primaries fails on all grounds:

(a) Plaintiff argues that the requirements violate his equal protection rights because they are not required of independent candidates, candidates in special elections to fill vacancies, presidential candidates in primary elections, candidates with no party affiliation, and independent candidates in city elections. But substantially similar procedures are required for petitions in each of those elections,[1] and the differences are clearly within the legislature's permissible range of alternatives since equal protection does not require identical procedures across-the-board.

---

[1]The following requirements are imposed for petitions filed in each of the five elections named by plaintiff:

(1) Independent candidates - Tex. Election Code Ann. art. 13.51 (1967) rquires a statement but no affidavit, although Tex. Att'y Gen. Op. No. H-407 (1974) requires an officer's certificate that persons signing the application were administered the oath contained in the statement.

(2) Special elections to fill vacanties - *Id.* art. 4.10(3)(a) (Supp. 1975) requires neither a statement nor an affidavit, but petition signers must meet the same requirements as contained in the statement.

(3) Presidential candidates in primaries - *Id.* art. 13.58(a), subdv. 3(a), (b), (c) (1967) requires neither an affidavit nor a statement, but the concern for preventing frivolous candidates from gaining access to the ballot furthered by article 13.08(d) is resolved by the complicated procedure required for getting one's name on the ballot.

(4) Candidates without party affiliation - *Id.* art. 13.54 (Supp. 1975) requires an affidavit but no statement.

(5) Independent candidates in city elections - *Id.* art. 13.53 (1967) requires neither statement nor affidavit, but petition signers must meet the same requirements as contained in the statement.

(b) Plaintiff's contention that the requirements violate his equal protection rights because they were not required in the 1972 and 1974 elections was not advanced at trial and borders on the frivolous.

(c) Plaintiff's claim that a number of election laws were not precleared as required by the Voting Rights Act is mooted by the pretrial stipulations, and defendants introduced in evidence letters from the Assistant Attorney General approving articles 4.10, 13.08(a), 13.08(d), 13.12(a), 13.50, 13.54, and 13.58(a). The only other statute challenged by plaintiff, article 13.53, was enacted in 1951 and last amended in 1963, so that it was in effect prior to November 1, 1972, and thus does not require preclearance.

(d) Plaintiff's claim that the statute imposes an impermissible burden on the first amendment right to vote by intimidating voters into refusing to sign petitions and refusing to vote fails because it was supported by no proof at trial.

(e) Plaintiff's contention that the wording of the statement confuses would-be petition signers, especially blacks, and thus constitutes a disguised literacy test was likewise not supported by proof at trial and is frivolous.

(f) Plaintiff's contention that no petitions were prepared in Spanish as required by the Voting Rights Act was likewise not pressed at trial and fails for want of proof. In fact, defendants introduced into evidence copies of petitions in Spanish that are available. Furthermore, article 13.08(d) permits candidates to supply



their own petitions in any language they desire.

Fifth, Howell's claim that his removal by defendant DeBusk while other candidates in the same situation were allowed to remain on the ballot denies him equal protection also fails. The candidates still on the ballot who failed to comply with article 13.08(d) remain there only because no private parties have challenged their candidacy in the same manner that others have challenged Howell's. Thus, state action is not the sourse of Howell's complaint. Equal protection complaints are properly founded in differing official treatment of persons similarly situated, but Howell's and Shafer's conditions obviously differ from that of persons whose candidacies have not been interdicted by court orders. Furthermore, even if state officials rather than private parties had removed Howell, one injured by proper enforcement of a statute cannot challenge the statute on grounds of selective enforcement.

Plaintiff not having prevailed, he is not entitled to attorneys' fees. *See* Sapp v. Renfro, 511 F. 2d 172, 178 (5th Cir. 1975).

**Other Contention**

Plaintiff Shafer contends that article 13.08(d) is so vague that only attorneys can understand it, thus imposing the financial burden of attorneys' fees on all candidates and denying equal protection to the poor. But the statute clearly states that voters need not take an oath while petition circulators must, and it is not vague.

The basic thrust of plaintiffs' suit is the implicit

objection that article 13.08(d) imposes such onerous requirements on candidates who seek to file petitions in lieu of a filing fee that it fails to provide the reasonable alternative to filing fees required by *Bullock*. But plaintiffs presented no evidence that the statute imposes an onerous burden, and we find none inherent in the statutory procedure. To the contrary, it appears to be and we find it reasonable.

The above constitutes the findings of facts and conclusions of law of the court.

/s/ THOMAS GIBBS GEE
Thomas Gibbs Gee
United States Circuit Judge

/s/ ROBERT MADDEN HILL
Robert Madden Hill
United States District Judge

/s/ PATRICK E. HIGGINBOTHAM
Patrick E. Higginbotham
United States District Judge



## APPENDIX C

**1976 Schedule**
**Election Code** **Art. 13.08**

**Art. 13.08 Conduct of the primary elections**

**(a) The primary election held by a political party pursuant to Sections 180 and 181 of this code (Articles 13.02 and 13.03, Vernon's Texas Election Code) shall be conducted through the party's state executive committee and county executive committees in accordance with the procedures detailed in this code.**

**(b) In order for a candidate to have his name placed on the ballot for the general primary election, his application for a place on the ballot must be accompanied by a filing fee or a nominating petition in compliance with Subsection (c) or (d) of this section.**

**(c) The schedule of fees for either a full term or an unexpired term for the various offices is as follows:**

| | |
|---|---|
| All Statewide offices | $1,000 |
| United States representative | 1,000 |
| State senator | 600 |
| State representative | 300 |
| Member, state board of education | 100 |
| Chief justice or associate justice, court of civil appeals | 500 |
| District judge or judge of any court having status of a district court as classified in Section 61c of this code | 500 |
| District attorney or criminal district attorney | 500 |

| | |
|---|---|
| All county offices, as classified in Section 61c,[1] except county surveyor and inspector of hides and animals | 200 |
| County surveyor or inspector of hides and animals | 100 |
| County commissioner, | |
| County of 200,000 or more inhabitants | 500 |
| County under 200,000 inhabitants | 200 |
| Justice of the peace or constable, | |
| County of 200,000 or more inhabitants | 400 |
| County under 200,000 inhabitants | 150 |
| Public weigher | 100 |

No fee shall be charged for any office of a political party.

(d) In lieu of the payment of a filing fee, a candidate may file a nominating petition which may be in multiple parts and must be signed by the qualified voters eligible to vote for the office for which the candidate is running as follows:

For statewide office, 5,000 signatures.

For district, county, precinct, or other political subdivisions, equal in number to at least two percent of the number of votes cast in the territory for that party's candidate for governor in the last preceding gubernatorial general election. However, in no event shall the number required be more than 500; and if two percent of the votes cast in the territory was less than 25, the number required is the lesser of 25 signatures or 10 percent of the number of votes cast.

[1]Article 6.05c.



Where a candidate is running in a district, county, or precinct which has been created or the boundaries of which have been changed since the last gubernatorial general election, he may request that the secretary of state in the case of a district or county office, or the county clerk of the county in which the precinct is situated in the case of a precinct office, make an estimate in advance of the filing deadline of the number of votes cast for that party's candidate for governor within that territory at the last gubernatorial election. Not later than the 15th day after receiving such a request, the officer shall make the estimate and notify the candidate, and also the officer with whom the candidate files his application. The estimate shall be used as the official basis for computing the number of signatures required on a petition. If an advance estimate is not requested, the officer with whom the petition is filed shall make the estimate, whenever necessary, before he acts on the sufficiency of the petition. In every instance, the candidate may challenge the accuracy of the estimate, and if he is dissatisfied with the final decision of the officer he may appeal the decision to any district court having jurisdiction in the territory involved.

The following statement shall appear at the head of each page of the petition: "I know the contents of this petition. I am a qualified voter eligible to vote in the forthcoming primary election of the (fill in name) Party for the office for which (fill in name) is a candidate. I have not signed the petition of a candidate who is running for any office[2] the primary of any other

[2]So in enrolled bill: word "in" probably omitted.

party. I understand that by signing this petition I become ineligible to affiliate with any other party or to participate in the primary elections, conventions, or other party affairs of any other party, including a party which is not holding a primary election, during the voting year in which this election is held, and that I am guilty of a misdemeanor if I attempt to do so."

To each part of the petition shall be attached an affidavit of the person who circulated it, stating that he called each signer's attention to the statement and read it to him before the signer affixed his signature to the petition, and further stating that he witnessed the affixing of each signature, that the correct date of signing is shown on the petition, and that to the best of his knowledge and belief each signature is the genuine signature of the person whose name is signed. A petition so verified is prima facie evidence that the signatures thereon are genuine and the persons signing it are registered voters.

The petition must show the following information with respect to each signer: His address (including his street address if residing in a city, and his rural route addres if not residing in a city), his current voter registration certificate number (also showing the county of isuance if the office includes more than one county), and the date of signing. The secretary of state shall prescribe a form for the petition before the 30th day prior to the filing deadline and provide copies of that form to the state chairman and the county chairmen of each party holding a primary election. However, a candidate may use any other



form which complies with the requirements of this section. It is the specific intent of the legislature that there shall be no requirement for the administering of an oath to any person signing a petition under the provisions of this section.

A petition filed under this section shall be filed with the same officer with whom an application for a place on the ballot for the office being sought is to be filed and must be filed at the same time as such an application.

(e) The fees paid to the county chairman and received from the state chairman pursuant to the provisions of Section 190 (Article 13.12, Vernon's Texas Election Code), and any contributions made to the county chairman or the county executive committee for the specific purpose of helping defray the costs of the primary elections shall be deposited to the credit of the primary fund referred to in Section 196 (Article 13.18, Vernon's Texas Election Code), and shall be applied to payment of the costs of the primary elections. The county chairman and the committee may also use any other available funds toward defraying costs. The remaining costs incurred shall be borne by the state except as otherwise provided by procedures outlined in the Texas Election Code. Within five days after the regular filing deadline, the chairman of the state executive committee shall forward to the secretary of state all filing fees for statewide offices collected pursuant to Subsection (c) of this section and an itemized listing of such fees. At the same time, the state chairman shall also forward all filing fees for district offices collected pursuant to

Subsection (c) of this section to the county chairman for each county lying partially or wholly within such district. The amount forwarded to each county chairman shall be equal to the quotient obtained upon dividing the appropriate filing fee by the number of counties in the district of the candidate paying the fee. The secretary of state shall deposit the fees forwarded to him in a suspense account with the state treasurer.

(f) In each county in which voting machines or an electronic voting system has been adopted, the county commissioners court shall permit the county-owned voting machines or voting equipment to be used for the primary elections, including the conduct of absentee voting for the elections, at a charge for use at each election not exceeding $16 per unit for voting machines adopted under Section 79 (Article 7.14, Vernon's Texas Election Code), and not exceeding $3 per unit for voting equipment adopted under Section 80 (Article 7.15, Vernon's Texas Election Code); provided, however, that the county commissioners court shall not be required to provide voting machines or equipment for use in any election precinct in which fewer than 100 votes were cast in the preceding first or general primary or runoff primary election. The maximum amount fixed in this subsection includes the lease price for the use of the unit, and also the charge for its preparation and maintenance if the county provides these services. The county is entitled to reimbursement for the cost of transporting the machines or equipment to and from the polling places if the county provides this service. Where voting is by an electronic



voting system, the county may not charge for use of county-owned automatic tabulating equipment at the central counting station; but all actual expenditures incidental and necessary to operation of the central counting station in counting the ballots are payable out of the primary fund.

(g) All expenses of the county clerk in conducting absentee voting in the primary elections, including the employment of additional deputies where necessary, shall be paid by the county. A county is not entitled to reimbursement for any expenditure of county funds in connection with absentee voting or any other services rendered by the county clerk in the primary elections, except for voting machines and/or punch card units used in conducting the absentee voting or any other services for which reimbursement is specifically authorized by law.

(h) The secretary of state is authorized to promulgate rules under which compensation is limited to polling places at which voters of more than one election precinct cast their votes, notwithstanding the provisions of Section 10(g) (Article 2.02(g), Vernon's Texas Election Code). The rules for such common polling places shall provide for adequate public notice by the county chairman to the voters in election precincts affected by the application of such rules and shall provide for an adequate number of polling places taking into account all other relevant factors including distances of polling places from parts of the precincts served, estimated voter turn-out, and geographic or other boundaries. However, the secretary of state may not require that there be less than one

polling place for each commissioner's precinct for reimbursement purposes.

(i) The secretary of state is authorized to promulgate rules in regard to the maximum number of election clerks who may be compensated for their services at a polling place and the maximum number of other necessary office personnel employed to assist in the performance of the duties placed upon the county chairman, taking into account the number of registered voters in the election precinct or precincts, the number of votes cast in the precinct, county, or state in previous elections, the method of voting, and any other relevant factors. The secretary of state must allow compensation for the presiding judge, alternate judge, and at least one clerk for each precinct. The secretary of state may allow compensation for clerks and other necessary office personnel employed in excess of the applicable limits set by his rules if he finds that the employment of additional clerks or other office personnel was justified by a good cause. The total compensation paid to the county chairman and the secretary of the county executive committee (where the executive committee has named a secretary) in the performance of the duties placed upon the chairman shall not exceed five percent of the amount actually spent in holding the primary elections for the year; provided, however, that in no case shall the total compensation paid be less than $300 nor more than $8,000.

(j) The secretary of state is authorized to promulgate any other reasonable rules which will minimize the costs of the primary elections. The secretary of



state shall furnish a copy of all rules promulgated pursuant to this section to each county chairman at least 10 days before the election to which the rules apply.

(k) The county chairman shall account for the primary fund in the manner provided in Section 196 of this code.[3]

(l) The secretary of state shall not approve any expenditure of state funds to any county organization that practices discrimination based on race, sex, age, creed, or national origin. The attorney general shall be specifically responsible for the enforcement of this section.

(m) In the event a court of competent jurisdiction declares any portion of this section or any other provision of this code relating to the financing of primary elections to be invalid, the secretary of state shall promulgate reasonable rules for the enforcement of the intent of the legislature, consistent with the court's judgment and the valid portions of the code. Such authority of the secretary of state shall include authority to promulgate a schedule of filing fees, if necessary, and that schedule shall be substituted for the statutory schedule until the legislature enacts a new schedule.

Amended by Acts 1967, 60th Leg., p. 1910, ch. 723, § 42, eff. Aug. 28, 1967; Acts 1975, 64th Leg., p. 2046, ch. 675, § 1, eff. Sept. 1, 1975.

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[3]Article 13.18.

## APPENDIX D

[FILED APR. 23, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No.
CA3-76-0481-G

G. L. (PETE) HOWELL, ET AL.
v.
MANUEL DeBUSK, ET AL.

### ORDER

IT IS HEREBY ORDERED that plantiffs' "Motion to Stay Judgment Pending Appeal" and "Motion for New Trial," filed April 21, 1976, are denied.

SIGNED AND ENTERED this 23rd day of April, 1976.

/s/ Thomas G. Gee
THOMAS G. GEE
United States Circuit Judge

/s/ R. M. Hill
ROBERT M. HILL
United States District Judge

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
United States District Judge



## APPENDIX E

[FILED APR 29, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION
NO.
CA 3-76-0481-F

G. L. (PETE) HOWELL, ET AL.

VS.

MANUEL DeBUSK, ET AL.

### NOTICE OF APPEAL

1. Notice is hereby given that G. L. (Pete) Howell, Clever Dean Lewis, Maria Patlan, Phila Mansur, and Helen Babb, plaintiffs in the above styled and numbered cause of action, hereby appeal to the Supreme Court of the United States from the final order entered in this action on April 22, 1976, the judgment entered in this action on April 15, 1976, and the order denying plaintiffs' motion to stay judgment pending appeal and motion for new trial entered in this action on April 23, 1976.

2. This appeal is taken pursuant to 28 U.S.C.A. 1253.

3. The clerk will please prepare a complete transcript of the record in this cause, for transmission

to the Clerk of the Supreme Court of the United States, upon request by said Court.

4. The following questions are presented by this appeal:

A. Whether or not the State has established the necessary justification for the present filing fee schedule as a revenue collecting device.

B. Whether or not a State law which prevents potential candidates for public office from seeking the nomination of their party due to their inabilty to pay a portion of the cost of conducting the primary election is state action that discriminates against the candidates so excluded or the voters who wish to support them.

C. Whether or not the State has established the requisite justification for the present filing fee schedule as a necessary or reasonable tool for regulating the ballot.

D. Whether or not by requiring candidates to shoulder a part of the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice.

E. Whether or not the State can exact the present set of filing fees from candidates as a regulatory pre-



condition to access to the ballot, if there is a less restrictive means of regulating the ballot available in the form of a nominating petition.

F. Whether or not the State has established the requisite justification for the present nominating petition requirements as a necessary or reasonable tool for regulating the ballot, and whether or not the challenged statutes are discriminatory on their face or as administered by the State of Texas and the Democratic Party in the 1976 primary elections.

5. In connection with the above questions, it should be pointed out that Emerson Emery, a black candidate for State Representative who has been removed from the ballot because of a defective nominating petition, testified at the trial that he used the nominating petition because it was cheaper than the filing fee; and it has been stipulated that Janet Shafer, another candidate for State Representative who has been removed from the ballot because of a defective nominating petition, is a pre-law student too poor to pay the statutory $300 filing fee.

Respectfully submitted,

/s/ A. L. Crouch
A. L. Crouch

Attorney for plaintiffs
G. L. (Pete) Howell, et al.
109 North Taylor Street
Fort Worth, Texas 76102

## CERTIFICATE OF SERVICE

I, A. L. Crouch, attorney for the above named plaintiffs and appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29 day of April, 1976, I served copies of the foregoing Notice of Appeal to the United States Supreme Court on the several parties thereto, as follows: by placing same in the mail, air, mail, special delivery, to: Ms. Elizabeth Levatino, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, attorney for respondents Briscoe, White and Hill; Mr. Earl Luna, 1002 Dresser Building, 1505 Elm Street, Dallas, Texas, 75201, attorney for respondents DeBusk, Guest and McDonald; and Ms. Janet L. Shafer, 1536 Bilco Street, Dallas, Texas, 75232, pro se. I further certify that I have also mailed a copy of the foregoing Notice of Appeal to the United States Supreme Court, Washington, D. C., airmail special delivery.

/s/ A. L. Crouch
A. L. Crouch



## APPENDIX F

[FILED FEB. 2, 1972]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-5373-C

RICK JOHNSTON, ET AL.

VS.

BOB BULLOCK, Secretary of State

### AMENDED ORDER

On this the 2nd day of February, 1972, came on for hearing the motion of the Secretary of State to amend the order of January 20, 1972, holding unconstituional House Bill No. 5, providing for filing fees for candidates for public office.

The Court after considering said motion is of the opinion that the motion is well taken and the order should be amended by adding the following immediately before the last paragraph of said order:

> The Secretary of State is likewise hereby authorized to make such rules and regulations and to take such other action as may be necessary to effectuate this order and for the uniform opera-

tion of primary elections consistent with *Carter v. Dies.*

Dated and entered this 2 day of February, 1972.

*/s/ Homer Thornberry*
United States Circuit Judge

*/s/ Sarah T. Hughes*
United States District Judge

*/s/ W. M. Taylor, Jr.*
United States District Judge



## APPENDIX G

### 1972 Schedule

STATE OF TEXAS
OFFICE OF THE SECRETARY OF STATE
AUSTIN, TEXAS 78711

BOB BULLOCK
SECRETARY OF STATE

W. O. BOWERS III
ASST. SECRETARY OF STATE

February 3, 1972

ORDER establishing rules for primary elections pursuant to the judgment of the Court in *Johnston v. Bullock* and pursuant to the duties of the Secretary of State as Chief Election Officer of this State.

The Secretary of State has made the following findings concerning the setting of primary filing fees for public offices.

1. There is a compelling state interest in regulating the ballot to permit the voter to make an intelligent choice among the candidates for office.

This compelling interest has been recognized by the Courts in *Carter v. Dies* 321 Fed. Supp. 1358 (1970), *Wetherington v. Adams* 309 Fed Supp. 318 (N.D. Fla., 1970), *Jenness v. Little* 306 Fed. Supp. 925 (N.D. Ga., 1969) *appeal dism'd* 397 U.S. 94 (1970).

2. There is no compelling state interest in using the primary filing fees as a revenue raising device. *Carter v. Dies* at 1362.

3. A filing fee should not be an absolute qualification for a person to have his name printed on the Primary ballot. *Carter v. Dies* at 1362.

4. A nominating petition of a reasonable size is a valid alternative to a filing fee because it provides an indication of support for the potential candidate. *Jenness v. Little*, supra.

## CONCLUSION

The Secretary of State concludes that the following fee schedule with a nominating petition as an alternative to the fee satisfies the state interest in regulating the ballot without placing a wealth requirement upon candidacy in Texas.

While fees will be collected under the rule, the purpose is not to raise revenue but to comply with the compelling state interest of regulating the ballot so that the voters may make an intelligent choice among the candidates for office.

The fees and nominating petition requirement set out in this order are mandatory upon those party officials of both parties who are charged with the statutory responsibility for conducting the primary elections.

## SCHEDULE OF FEES

The schedule of fees for either a full term or an unexpired term for the various offices is as follows:

| | |
|---|---|
| a. All statewide offices | $400 |
| b. United States Representative | $300 |
| c. State Senator | $150 |
| d. State Representative | $100 |
| e. Member, State Board of Education | $ 50 |



| | |
|---|---|
| f. Chief Justice or Associate Justice, Court of Civil Appeals | $100 |
| g. District Judge or Judge of any other court having status of district office as classified in Article 6.05, Texas Election Code | $100 |
| h. District Attorney or Criminal District Attorney | $100 |
| i. All county offices, as classified in Article 6.05a, Texas Election Code, except county surveyor or inspector of hides and animals | $100 |
| j. County Surveyor or Inspector of Hides and Animals | $ 50 |
| k. County Commissioner | $ 50 |
| l. Justice of the Peace or Constable for counties above 200,000 population, for | $ 50 |
| counties under 200,000 population | $ 25 |
| m. For all party offices | None |

## NOMINATING PETITIONS

In lieu of payment of a filing fee, a candidate may file a nominating petition which must be signed by the qualified voters eligible to vote for the office for which the candidate is running as follows:

For statewide offices, 2,500 signatures.

For district, county, precinct, or other political subdivisions, equal in number to at least 2% of the entire vote cast for that party's candidate for governor in the last preceding general election in that territory. In no

event shall the number of signatures required be less than 25 nor more than 300.

No person shall sign more than one nominating petition for the same office. Signing two petitions makes both signatures void.

The nominating petitions must be submitted to the appropriate official by the first Monday in March.

No deposit shall be required to accept an application to have a candidate's name placed on the primary ballot. The filing fee required above must be paid in full on or before the fourth Monday in February; or in the alternative, the nominating petition provided for above must be filed on or before the first Monday in March.

/s/ Bob Bullock
Bob Bullock
Secretary Of State



## APPENDIX H

[FILED FEB. 8, 1972]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-5373-C
(3-Judge)

RICK JOHNSTON, et al.

vs.

EARL LUNA, et al.

## ORDER

Came on for consideration the Motion of Plaintiffs Reubin Jenkins and Theodore H. Wischkaemper for Supplemental Relief striking down the filing fees and nominating petitions which the Secretary of State has imposed as a pre-condition to access to the ballot, and restraining the imposition by the said Secretary of State of further filing fees and nominating petitions without prior approval of this Court after notice and hearing, which said filing fees, nominating petitions and other rules and regulations promulgated by Defendant Bob Bullock, Secretary of the State of Texas, in a document dated February 3, 1972, and being filed in the papers of this case, which has been considered by the Court along with Plaintiffs' Motion for Supplemental Relief, and the Court being of the opinion that such Motion should be in all things denied,

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that the Motion of Plaintiffs Reubin Jenkins and Theodore H. Wischkaemper for Supplemental Relief, filed herein on February 4, 1972, be and same is hereby denied.

/s/ Homer Thornberry
HOMER THORNBERRY
United States Circuit Judge

/s/ Sarah T. Hughes
SARAH T. HUGHES
United States District Judge

/s/ W. M. Taylor, Jr.
W. M. TAYLOR JR.
United States District Judge



## APPENDIX I

**1974 Schedule**
**Election Code** **Art. 13.08c-2**

Ch. 542
63rd LEGISLATURE — REGULAR SESSION

ELECTIONS — CONDUCT AND FINANCING OF 1974 PRIMARIES — REGISTERED VOTERS — PARTY NOMINATIONS — FILING PROCEDURE — BALLOTS

CHAPTER 542

S.B. No. 11

An Act enacting temporary provisions relating to the conduct and financing of primary elections held in 1974; also enacting permanent provisions relating to the minimum and maximum number of registered voters in a voting precinct, the standards for determining whether a party makes its nominations by primary elections or by conventions, the filing procedure for primary election candidates, and the number of ballots furnished for each voting precinct in primary elections; amending the following sections of the Texas Election Code, as amended: Paragraph (b), Section 12 (Article 2.04, Vernon's Texas Election Code); Section 180 Article 13.02); Subsection (c), Section 187 (Article 13.09); Paragraph 2, Section 190 (Article 13.12); and Subdivision 1, Section 222 (Article 13.45); and declaring an emergency.

*Be it enacted by the Legislature of the State of Texas:*

Section 1.[71] Conduct of the Primary Elections. (a) Nominations for the general election to be held on November 5, 1974, shall be made in the manner provided in the Texas Election Code, as amended. The primary elections held by a political party pursuant to Sections 180 and 181, Texas Election Code (Articles 13.02 and 13.03, Vernon's Texas Election Code), shall be conducted through the party's state executive committee and county executive committees in accordance with the procedures detailed in the Texas Election Code, as amended, with the following modifications and clarifications:

(b) In order for a candidate to have his name placed on the ballot for the general primary election, he must have either paid a filing fee or filed a nominating petition in compliance with Section 1(c) of this Act.

(c) Payment of filing fee:

Every candidate for public office shall accompany his application for a place on the general primary ballot with a filing fee in the amount prescribed in this section, unless he uses a nominating petition prescribed by this section. The schedule of fees is as follows:

| | | |
|---|---|---|
| 1. | All statewide offices | $1,000 |
| 2. | United States representative | 500 |
| 3. | State senator | 400 |
| 4. | State representative | 200 |

[71]V.A.T.S Election Code, art. 13.08c–2.



| | | |
|---|---|---|
| 5. | Member, State Board of Education | 50 |
| 6. | Chief Justice or Associate Justice, Court of Civil Appeals | 400 |
| 7. | District judge or judge of any other court having status of district office as classified in Section 61c, Texas Election Code | 400 |
| 8. | District attorney or criminal district attorney | 400 |
| 9. | All county offices, as classified in Section 61c, Texas Election Code, except county surveyor or inspector of hides and animals | 150 |
| 10. | County surveyor or inspector of hides and animals | 50 |
| 11. | County commissioner | 100 |
| 12. | Justice of the peace or constable, for counties above 200,000 population | 100 |
| | for counties under 200,000 population | 50 |
| 13. | Public weigher | 50 |

In lieu of payment of a filing fee, a candidate may file a nominating petition which must be signed by the qualified voters eligible to vote for the office for which the candidate is running as follows:

For statewide offices, 5,000 signatures.

For district, county, precinct, or other political subdivisions, equal in number to at least two percent of the entire vote cast for that party's candidate for governor in the last prceding general election in the territory. In no event shall the number of signatures

required be less than 25 nor more than 500.

No person shall sign more than one nominating petition for the same office. Signing two petitions makes both signatures void.

The nominating petitions must be submitted to the appropriate official with the candidate's application for a place on the general primary ballot.

* * *

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1975

* * *

NO. 76-287

* * *

**G. L. (PETE) HOWELL, ET AL.**
*Appellants*

V.

**MANUEL DeBUSK, ET AL.,**
*Appellees*

* * *

* * *

# MOTION TO AFFIRM

* * *

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September, 1976

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NO. 76-287

* * *

G. L. (PETE) HOWELL, ET AL.,
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MANUEL DeBUSK, ET AL.,
*Appellees*

* * *

MOTION TO AFFIRM

* * *

TO THE SUPREME COURT OF THE UNITED STATES:

NOW COME Appellees and, pursuant to Rule 16, Rules of the Supreme Court, move the Court to affirm the judgment of the court below on the ground that it is manifest that the questions on which the cause depends are so insubstantial as not to need further argument.

**STATEMENT**

Appellants Howell and Shafer attempted to qualify as candidates in the 1976 Democratic Party primary in Dallas County, Texas, by submitting nominating petitions in lieu of paying filing fees, as authorized by Article 13.08, Texas Election Code (Appendix C, Jurisdictional Statement). The petitions, however, were defective in that the certificates of the circulators were

not duly notarized and thus were not "affidavits" as required by Article 13.08 (d). Primary opponents of Appellants Howell and Shafer brought suit, and a state court found the affidavit requirement to be mandatory.[1] Party and state officials, Appellees herein, were then ordered to remove the names of Howell and Shafer from the ballot. Howell and Shafer, along with qualified voters who wished to vote for them, then filed this suit, alleging that Article 13.08 of the Texas Election Code was unconstitutional. A three-judge district court found that the challenged statute violated neither the Fourteenth nor the First Amendment (Appendices A and B, Jurisdictional Statement) and denied all relief.

## ARGUMENT

### 1. COLLATERAL ESTOPPEL

Appellants' contention that the 1976 requirements for nominating petitions are unreasonable and unnecessary as a matter of law merely because there were fewer such requirements in 1972 was dismissed by the trial court because it "was not advanced at trial and borders on the frivolous." This conclusion is clearly correct.

On February 3, 1972, the Secretary of State of the State of Texas was faced with a grave and immediate problem: Filing fees--the only legal method to control the number of candidates on the ballot and to finance the primary elections--had twice been struck down as unconstitutional. *Carter v. Dies*, 321 F.Supp. 1358 (1970); *Johnston v. Luna*, 338 F.Supp. 355 (1972). The Texas Legislature would not be convened in regular

[1]At no time during this state litigation did Howell or Shafer challenge the constitutionality of any statute; thus, the state courts were denied the opportunity to consider the questions raised herein, just as this Court was deprived of the ability to review any decisions of those courts adverse to the constitutional claims of Appellants.



session until the next year and thus could not attempt to enact a constitutional scheme in time for the May, 1972, primaries. To deal with this emergency, the Secretary of State petitioned the *Johnston* court to amend its order of January 20, 1972, to allow the promulgation of rules and regulations for primary elections. Pursuant to this amended order (Appendix F, Jurisdictional Statement), a schedule of filing fees, along with procedures concerning nominating petitions, were imposed by the Secretary of State. (Appendix G, Jurisdictional Statement.) Contrary to Appellants' assertion, this schedule was not *approved* by the *Johnston* court; rather, that court merely denied a motion to strick down the newly authorized filing fees and nominating petitions imposed and refused to grant Plaintiffs' request that the Secretary of State be prevented from imposing further filing fees and nominating petitions without prior approval of the Court. (Appendix H, Jurisdictional Statement.)

Appellants are now attempting to construe the latter order as an eternal freeze of the State's ability to control access to party primary ballots! Their efforts to convince the three-judge court below that, on the merits, the new filing fees and nominating petitions were unconstitutional were soundly rejected, so they now attempt to concumvent the equal protection analysis (and to shift the burden of proof to the State) by reaching for the doctrine of *res judicata*, a principle wholly inapplicable when the second suit involves a different factual and legal basis than present in the first.

This Court has consistently recognized that the State "has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Jenness v. Fortson*, 403 US. at 442, 29 L.Ed.2d at 652." *Bullock v. Carter*, 405 U.S. 134,145 (1972). The State of Texas, by now ensuring that persons

who sign a nominating petition are registered voters and members of the candidate's political party, is attempting to fulfill this responsibility within constitutional guidelines and surely is not precluded from so doing by the unfortunate occurences of the past.[2]

2. THE FIRST AMENDMENT

Article 13.08 in no way inhibits a voter from associating with the political party of his or her choice, but merely demands that persons who sign a petition to aid a candidate desiring to run in a party primary become members of that political party for the voting year. This restriction clearly furthers the valid state goal of preserving the integrity of the electoral process by confining voters "to supporting one party and its candidates in the course of the same nominating process." *American Party of Texas v. White*, 415 U.S. 767, 786 (1974). Nor is the statutory language vague. In resolving vagueness questions, this Court has recognized that "there are limitations in the English language with respect to being both specific and manageably brief" and accordingly has held that, when a statute is set out in terms that an ordinary person exercising ordinary common sense can sufficiently understand, it will be upheld. *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). See also *United States v. Vuitch*, 402 U.S. 62 (1971). An ordinary person, when reading the statement at the head of the petition, would realize that he was binding himself as a member of a political party for that

[2]Indeed, this Court, in *American Party of Texas v. White*, 415 U.S. 767 (1974), recognized both the 1972 and the 1974 legislative responses to its decision in *Bullock v. Carter*, 405 U.S. 134 (1972).



voting year. A person with ordinary common sense need not speculate as to the clear meaning of this promise. That Appellants have suggested marginal situations in which a few persons might have doubts in no way threatens the validity of the statute. *United States v. Harris*, 347 U.S. 612, 618 (1954).

Article 13.08(d) requires that the person who circulated a petition swear that he witnessed each voter's signature. By so swearing, the circulator necessarily reveals his identity. Appellants argue that this constitutes an invalid restraint on free expression. The State has a compelling interest, however, to ensure that a nominating petition reflects the desires of the signers and is not a fictitious document. An affidavit requirement is the least restrictive method, if not the only viable one, to ensure that the petition is not fictitious and was in fact signed by eligible, registered voters. Claims of Appellants that this requirement is unduly burdensome approach the frivolous and are totally unsupported by any evidence.

3. THE FOURTEENTH AMENDMENT

Even more frivolous is the argument that requiring the circulator to read a statement to each signer before the petition is signed creates an impermissible presumption of illiteracy. The statement itself does no more than explain to a potential signer what the law is. Such requirement is to the benefit of the signer, for it ensures that he is aware of the ramifications of his actions, and to the benefit of the candidate, for it avoids the possible voiding of signatures of ineligible signers. By requiring that the circulator call each signer's attention to the statement, the State is aiding candidates and their supporters, as well as furthering its own goal of protecting the integrity of its party primary elections.

Appellants' next equal protection argument arises from a tortured construction of Article 13.08(d), for they attempt to assail different classes of circulators where there are none to be found. Signers need never swear to their signatures; circulators must attach sworn affidavits to petitions. If a circulator of one petition signs another, he need not swear to his signature on the latter, but he must affix the circulator's affidavit to the first petition. Any other reading of Article 13.08 would indeed defy rational explanation. Appellants never suggested at trial that their peculiar reading of the law explained the absence of jurats on the nominating petitions that gave rise to this litigation.

> "If claiming an equal protection violation, the appellants' burden was to domonstrate in the first instance a discrimination against them of some substance." *American Party of Texas v. White*, 415 U.S. 767, 781 (1974).

Since a straight forward reading of the statute creates no classes at all, there can be no equal protection problem, and Appellants' contention must fail.

Appellants completely misconstrue the interest of county party officials in the collection of filing fees. While it is true that the fees collected are used to defray the cost of the primary elections in the county, the county chairman has no direct pecuniary interest in the amount so collected, for all election costs above the amounts collected and/or received as contributions are borne by the State. Article 13.08(l). A county chairman's compensation is set by the Secretary of State and is unaffected by the amount of filing fees actually collected. Article 13.08(i). Thus, Appellants' due process challenge must fail.

Most of the challenges met so far in this argument are being raised in this Court for the first time. The charge



that allowing other candidates with similarly faulty nominating petitions to remain on the ballot denied Appellants equal protection, however, was raised in the trial court and correctly dismissed. Appellees did not discriminate in their application of Article 13.08. Private parties--not the State--brought the state court actions. Appellants' names were stricken from the primary ballot only because Appellees were under valid court orders to do so. Obedience of a final judgment of a court is not state action, and cannot be considered the source of Appellants' equal protection complaint.[3]

4. LEAST DRASTIC MEANS

Appellants have failed to show that the required statements and affidavits are unduly burdensome, and yet ask this Court to prohibit procedures by which the State can ascertain that nominating petitions are true reflections of the desires of eligible, registered voters. In *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court upheld a requirement that each signature on a similar petition be notarized--clearly a more burdensome requirement than those at issue here--and rejected First and Fourteenth Amendment challenges by stating that "the argument that the statute is unduly burdensome approaches the frivolous." *Id.*, at 789.

## CONCLUSION

The trial court concisely summarized Appellants' arguments:

> "The basic thrust of plaintiff's suit is the implicit objection that Article 13.08(d) imposes

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[3]*Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974), cited by Appellants, is clearly inapplicable, for the action challenged there was the State Elections Board's unequal application of a loyalty oath requirement.

such onerous requirements on candidates who seek to file petitions in lieu of a filing fee that it fails to provide the reasonable alternative to filing fees required by *Bullock*. But plaintiff presented no evidence that the statute imposes an onerous burden, and we find none inherent in the statutory procedure. To the contrary, it appears to be and we find it reasonable." (Appendix B, Jurisdictional Statement.)

Appellees suggest that the questions raised by the Jurisdictional Statement are so insubstantial as not to need further argument, and pray that the Court therefore affirm the judgment of the court below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, David M. Kendall, First Assistant Attorney General of the State of Texas, do hereby certify that a



true and correct copy of the above and foregoing Motion to Affirm has been placed in the United States Mail, postage prepaid, certified mail, return receipt requested, to Mr. A.L. Crouch, Attorney at Law, 109 North Taylor Street, Fort Worth, Texas 76102, Attorney for Appellants, on this the _____ day of September, 1976.

DAVID M. KENDALL

No. 76-287

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

G. L. (PETE) HOWELL, ET AL., *Appellants*

*vs.*

MANUEL DeBUSK, ET AL., *Appellees*

On appeal from the United States District Court
for the Northern District of Texas, Dallas Division

## Appellants' Reply Brief

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## Appellants' Reply Brief

In their Motion to Affirm, Appellees have charged Appellants with a "tortured construction" of the challenged statute; Appellants now charge Appellees with a "tortured construction" of the doctrine of *res judicata*.

Several years ago a certain Fort Worth lawyer used to regale his friends with the story of a colleague who had compromised and settled a negligence case for a family of three involved in an automobile collision. After the settlement check had been cashed and spent, the plaintiffs discovered that there was no mention of the baby in the releases which had been signed, so

they hurried back to their lawyer, demanding that he "try the baby case."

Now, it appears that the Attorney General has been prevailed upon by his clients to "try the baby case," because they think they have found a flaw in the compromise settlement agreement of February 3, 1972 (Appendix G, Jurisdictional Statement). But this baby, like the mule, is without either pride of ancestry or hope of progeny. Nevertheless, the foundling has been presented to the Supreme Court of the United States for adoption.

"Appellants are . . . attempting to construe the . . . order," Appellees complain on page 3 of their Motion, "as an eternal freeze of the State's ability to control access to party primary ballots!"

If Appellants have committed error in construing the two orders which the three-judge *Carter* court entered in the case of *Johnston v. Luna*, 338 F.Supp. 355 (1972), on February 2, 1972 (Appendix F, Jurisdictional Statement) and February 8, 1972 (Appendix H, Jurisdictional Statement) as authorization and approval of a compromise settlement agreement, they are in distinguished company, because a three-judge Federal District Court for the Northern District of Georgia, in a per curiam opinion dated May 4, 1972, had this to say in the case of *Stoner v. Fortson*, 359 F.Supp. 579 (1972), at page 585:

> The three-judge district court in Texas which gave effect to Bullock v. Carter, authorized the state election officials to set rules and regulations *commensurate with the holding of the Supreme*



> *Court in that case* (emphasis added). Qualifying fees were thereafter set in range with a maximum of $400. An alternative method of qualifying by petition . . . was also set. Johnston v. Bullock (sic), N. D. Texas, Civil Action No. 3-5373-C.

Table I, page 10, of this brief, shows the 1976 schedule of filing fees involved in the present constitutional challenge, as compared with the 1974 schedule of filing fees and the 1972 schedule of filing fees. This same table was attached to Plaintiff's Original Complaint in the trial court as Exhibit "C".

To induce the three-judge *Carter* court to approve the 1972 schedule of ballot access requirements in the *Johnston* case, the Secretary of State incorporated the following conclusion into his order of February 3, 1972 (Appendix G, Jurisdictional Statement):

> The Secretary of State concludes that the following fee schedule with a nominating petition as an alternative to the fee satisfies the state interest in regulating the ballot without placing a wealth requirement upon candidacy in Texas.

If the doctrine of *res judicata* does not apply an "eternal freeze" to the 1972 schedule, then the conclusion of the Secretary of State is at least a judicial admission against interest by a party to the litigation which needed to be overcome by the State at the trial of this cause with evidence of such a material change of circumstances that an escalation of ballot access requirements over those required by the 1972 schedule would be justified. No such evidence was offered.

The United States Court of Appeals for the Tenth Circuit, on June 3, 1976, decided the case of *Gallagher v. Evans*, 536 F. 2d 899 (1976), which had not appeared in the advance sheets at the time Appellants prepared their Jurisdictional Statement in the instant case.

The plaintiffs in the *Gallagher* case were candidates for various offices in the June 6, 1972, New Mexico primary election, who had paid certain statutory filing fees under protest and sued the Secretary of State for refund of their money, alleging the statute to be unconstitutional. The three-judge Federal District Court ruled for the Secretary of State and the plaintiffs appealed. The Tenth Circuit reversed and remanded. Circuit Judge Breitenstein, speaking for the Court of Appeals, ruled as follows:

> "[4] * * * The constitutionality of § 3-8-26 was attacked in *Dillon v. Fiorina*, D.N.Mex., 340 F.Supp. 729, by a candidate for nomination to the office of United States Senator. On March 24, 1972, a three-judge federal district court held that the fee was indistinguishable from the fees struck down in *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92, and declared that the statute "is unconstitutional as it applies to the office of United States Senator," 340 F.Supp. at 730. * * *
>
> "To sustain the statute the defendant asserts that the fees are reasonable. . . .
>
> "[5] We have no reason to explore the reasonableness of the New Mexico statute. . . . The three-judge federal district court found the statute unconstitutional as applied to candidates for



> the office of United States Senator and enjoined its enforcement against them. That decision was not appealed. . . .
>
> * * *
>
> "The defendant Secretary of State would have us enforce a law as to several classes of persons when that law had been declared unconstitutional as applied to another class of persons. This discriminatory treatment would deny the plaintiffs equal protection of the laws in violation of the Fourteenth Amendment.
>
> "[6, 7] The construction of a constitutional provision must be uniform. See 1 Cooley on Constitutional Limitations, 1927 ed., 123-124, citing, inter alia, *Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 and *South Carolina v. United States*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261. A valid statute may become invalid by change in conditions to which it is applied. *Nashville, Chattanooga & St. Louis Railways v. Walters*, 294 U.S. 405, 415, 55 S.Ct. 486, 79 L.Ed. 949, and *Abie State Bank v. Bryan*, 282 U.S. 765, 772, 51 S.Ct. 252, 75 L.Ed. 690. Here we have a change in conditions resulting from the federal district court decision that the candidates for the United State Senate do not have to pay the fee.
>
> "All the candidates should be treated the same. The plaintiffs are entitled to recover the fees which they paid under protest and which are held in a suspense fund awaiting the outcome of this litigation.
>
> "Reversed and remanded for further proceedings in the light of this opinion."

Should the Appellants be mistaken in their belief that the doctrine of *res judicata* applies to the judg-

ment of the three-judge *Carter* and *Johnston* court, dated February 8, 1972 (Appendix H, Jurisdictional Statement), then the attention of the Supreme Court is respectfully invited to Table II, page 11, entitled "Comparison of 1970-1976 Filing Fees."

"On March 24, 1972," according to Judge Breitenstein in the *Gallagher case*, "a three-judge federal district court held . . . [the New Mexico filing fee for United States Senator] indistinguishable from the fees struck down in *Bullock v. Carter*, 405 U.S. 134 . . ., and declared that the statute is unconstitutional as it applies to the office of United States Senator."

In the case at bar, not only is the 1976 filing fee for United States Senator "indistinguishable from the fees struck down in *Bullock v. Carter*," there are several challenged filing fees, including that for United States Senator, which are "indistinguishable" *because they are the very same fees struck down by the Supreme Court in the Bullock case over 4 years ago!*

An inspection of Table II, page 11, reveals that out of 50 offices printed on the May 2, 1970, Democratic Primary Election ballot for Tarrant County, Texas, 9 of those offices (or 18%) had higher filing fees in 1976 than in 1970, and 21 offices (or 42%) had exactly the same filing fees in 1976 as in 1970, while only 20 offices (or 40%) had lower filing fees in 1976 than in 1970. In other words, for 60% of the offices on this ballot the 1976 filing fee was either still the same, *or even higher*, than the 1970 filing fee, in spite of the fact that the Supreme Court of the



United States, on February 24, 1972, in a unanimous opinion written by Mr. Chief Justice Burger, declared the 1970 Texas filing fees to be "patently exclusionary" and unconstitutional. See *Bullock v. Carter*, 405 U.S. 134 (1972).

Appellants respectfully suggest that there should be an "eternal freeze" of these outlawed filing fees at some point, and that if the doctrine of *res judicata* does not apply to the order which the three-judge *Carter* court entered in the case of *Johnston v. Luna*, 338 F.Supp. 355 (1972), on February 8, 1972 (Appendix H, Jurisdictional Statement), then at least *res judicata* should apply to the unanimous opinion of the Supreme Court of the United States, entered in the case of *Bullock v. Carter*, 405 U.S. 134 (1972), on February 24, 1972.

As Mr. Justice Frankfurter said in *Angel v. Bullington*, 330 U.S. 183, 192-193 (1947):

> "The first litigation raised and adjudicated federal issues every one of which is again involved in the second suit. * * * If tolerated, our federal system would afford fine opportunities for needlessly multiplying litigation in this way. The doctrine of *res judicata* is a barrier against it. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. Compare, *e. g.*, *Hazel-Atlas Co. v. Hartford*

*Co.*, 322 U. S. 238, 244. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. *Chicot County Dist. v. Bank*, 308 U.S. 371.

*Judgment reversed.*

Wherefore, premises considered, Appellants pray for an application of the doctrine of *res judicata* as to all issues of fact and of law previously determined by final judgment of a court of competent jurisdiction, whether relating to filing fees or alternative nominating petitions, as ancillary to the consideration of any judgment on the merits of this cause.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, A. L. Crouch, attorney for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the.....day of October, 1976, I served a copy of the foregoing Appellants' Reply Brief on Appellees by depositing a copy in the United States mail, postage prepaid, and addressed to the attorneys of record for said Appellees as follows: John L. Hill, Attorney General of Texas, and David M. Kendall, First Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, attorneys for appellees Briscoe, White and Hill; and Mr. Earl Luna, 1002 Dresser Building, 1505 Elm Street, Dallas, Texas, 75201, attorney for appellees DeBusk, Guest and McDonald.

I further certify that I have mailed a copy of same to Mr. Ronald W. Kessler, successor Chairman of Dallas County Democratic Executive Committee, Metropolitan Federal Savings Bldg., 1407 Main Street, Dallas, Texas, 75202, *pro se*, ex-officio successor Appellee, and to Ms. Janet L. Shafer, 1536 Bilco Street, Dallas, Texas, 75232, *pro se*.

---

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## TABLE I.

### 1976 FILING FEES AND 1974 FILING FEES, AS COMPARED WITH 1972 FILING FEES ESTABLISHED BY SECRETARY OF STATE BOB BULLOCK "PURSUANT TO THE JUDGMENT OF THE COURT"

| | 1972[1] | 1974[2] | 1976[3] |
|---|---|---|---|
| a. All statewide offices | $400 | $1,000 | $1,000 |
| b. United States Representative | 300 | 500 | 1,000 |
| c. State Senator | 150 | 400 | 600 |
| d. State Representative | 100 | 200 | 300 |
| e. Member, State Board of Education | 50 | 50 | 100 |
| f. Chief Justice or Associate Justice, Court of Civil Appeals | 100 | 400 | 500 |
| g. District Judge or judge of any other Court having status of district office | 100 | 400 | 500 |
| h. District Attorney or Criminal District Attorney | 100 | 400 | 500 |
| i. All County offices, as classified in Art. 6.05a, Texas Election Code, except surveyor or inspector of hides and animals | 100 | 150 | 200 |
| j. County Surveyor or Inspector of Hides and Animals | 50 | 50 | 100 |
| k. County Commissioner | 50* | 100* | |
| Counties of 200,000 or more inhabitants | | | 500 |
| Counties of under 200,000 inhabitants | | | 200 |
| l. Justice of the Peace or Constable | | | |
| For Counties above 200,000 population | 50 | 100 | 400 |
| For Counties under 200,000 population | 25 | 50 | 150 |
| m. Public Weigher | None | 50 | 100 |
| n. For all party offices | None | None | None |

1. As fixed by order of the Secretary of State, dated February 3, 1972 (Appendix G, Jurisdictional Statement), and approved by the **Carter** court in the case of **Johnston v. Luna,** 338 F. Supp. 355 (1972), by order dated February 8, 1972 (Appendix H, Jurisdictional Statement).

2. As fixed by Art. 13.08c-2 (Supp. 1973), Texas Election Code (Appendix I, Jurisdictional Statement).

3. As fixed by Art. 13.08 (Supp. 1975), Texas Election Code, (Appendix C, Jurisdictional Statement), which statute is being challenged in the case at bar.

*No population brackets specified. Any fee determined according to population would be an invidious discrimination against residents of populous counties in favor of residents of rural counties. See **Moore v. Ogilvie,** 394 U. S. 814 (1969).



## TABLE II

### COMPARISON OF 1970-1976 FILING FEES

#### A. STATEWIDE OFFICES

| | 1970[a] | 1972[1] | 1974[2] | 1976[3] |
|---|---|---|---|---|
| 1. United States Senator | $1,000 | $400 | $1,000 | $1,000 |
| 2. Governor | 1,000 | 400 | 1,000 | 1,000 |
| 3. Lieutenant Governor | 1,000 | 400 | 1,000 | 1,000 |
| 4. Attorney General | 1,000 | 400 | 1,000 | 1,000 |
| 5. Comptroller | 1,000 | 400 | 1,000 | 1,000 |
| 6. Commissioner of Land Office | 1,000 | 400 | 1,000 | 1,000 |
| 7. Agriculture Commissioner | 1,000 | 400 | 1,000 | 1,000 |
| 8. Railroad Commissioner | 1,000 | 400 | 1,000 | 1,000 |
| Supreme Court | | | | |
| 9. Associate Justice, Place 1 | 1,000 | 400 | 1,000 | 1,000 |
| 10. Associate Justice, Place 2 | 1,000 | 400 | 1,000 | 1,000 |
| 11. Associate Justice, Place 3 | 1,000 | 400 | 1,000 | 1,000 |
| Court of Criminal Appeals | | | | |
| 12. Chief Judge | 1,000 | 400 | 1,000 | 1,000 |
| 13. Judge | 1,000 | 400 | 1,000 | 1,000 |

#### B. CERTAIN TARRANT COUNTY OFFICES

**District Offices**

| | 1970 | 1972[1] | 1974[2] | 1976[3] |
|---|---|---|---|---|
| 14. State Representative, Place 1 | $ 300[b] | $100 | $ 200 | $ 300 |
| 15. State Representative, Place 2 | 300[b] | 100 | 200 | 300 |
| 16. State Representative, Place 3 | 300[b] | 100 | 200 | 300 |
| 17. State Representative, Place 4 | 300[b] | 100 | 200 | 300 |
| 18. State Representative, Place 5 | 300[b] | 100 | 200 | 300 |
| 19. State Representative, Place 6 | 300[b] | 100 | 200 | 300 |
| 20. State Representative, Place 7 | 300[b] | 100 | 200 | 300 |
| 21. State Representative, Place 8 | 300[b] | 100 | 200 | 300 |
| 1. State Senator, Place 10 | 300[b] | 150 | 400 | 600 |
| 2. State Senator, Place 12 | 300[b] | 150 | 400 | 600 |
| 3. Board of Education, Place 1 | 50[c] | 50 | 50 | 100 |

**Local Offices**

| | 1970[b] | 1972[1] | 1974[2] | 1976[3] |
|---|---|---|---|---|
| 4. County Surveyor | $ 50 | $ 50 | $ 50 | $ 100 |
| 5. Public Weigher | 50 | None | 50 | 100 |
| 6. Justice of the Peace, Place 4 | 50 | 50 | 100 | 400 |
| 7. Justice of the Peace, Place 5 | 125 | 50 | 100 | 400 |
| 8. Justice of the Peace, Place 6 | 300 | 50 | 100 | 400 |
| 9. Justice of the Peace, Place 7 | 50 | 50 | 100 | 400 |

a. As fixed by Art. 13.15, Texas Election Code, declared unconstitutional in the case of **Carter v. Dies,** 321 F. Supp. 1358 (1970), affirmed sub nom. **Bullock v. Carter,** 405 U.S. 134 (1972).

b. As assessed by the Tarrant County Democratic Executive Committee under the terms of Art. 13.08(1), Texas Election Code, declared unconstitutional in the case of **Carter v. Dies,** 321 F. Supp. 1358 (1970), affirmed sub nom. **Bullock v. Carter,** 405 U.S. 134 (1972). See Table I, Appellees' Brief, U.S. Supreme Court, page 42.

c. As fixed by Art. 13.08(4), Texas Election Code, declared unconstitutional in the case of **Carter v. Dies,** 321 F. Supp. 1358 (1970), affirmed sub nom. **Bullock v. Carter,** 405 U. S. 134, (1972).

1. See footnote 1, Table I.
2. See footnote 2, Table I.
3. See footnote 3, Table I.